80-1878

Office-Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. _____

OTTO BURGDORF,
Petitioner

vs

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

OTTO BURGDORF
Route 2, Box 680
Woodland, California

In Prop. Persona, Petitioner

In the Supreme Court of the United States

October Term 1981

OTTO BURGDORF

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner, Otto Burgdorf, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 24, 1980.

QUESTIONS PRESENTED

The judgment of the Court of Appeals for the Ninth District is contrary to the seventh amendment of the United States Constitution.

GROUNDS FOR JURISDICTION

The ground upon which the jurisdiction of the Supreme Court is based is the jury trial clause of the seventh

amendment of the United Constitution.

Jurisdiction of this petition is conferred on this court by 28 U.S.C. Sections 1254 and 1654 and Rule 17a of Rules of Supreme Court, specifically "as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

A claim for indemnification and demand for jury trial was filed on March 22, 1979, in the United States District for the Eastern District of California and filed as CIV-S-78-185 PCW. Part of this document is entered as Exhibit A in the appendix.

At the trial of this action, with no jury present, Petitioner, when called upon to testify, refused to participate in the proceedings for lack of a jury and so advised the judge. He turned on his heel and walked out. The decision of the presiding judge at this action is entered as exhibit B in the appendix. It is to be noted in this decision that the statement that both parties to the action were present at the trial deliberations is false.

The decision of this said district court was appealed to the Court of Appeals for the Ninth District with a request that an order issue to the said district court for a jury trial. The afore-mentioned court of appeals affirmed the decision of the lower court. This decision is appended as Exhibit C.

Both courts, the district court as well as the court of appeals, based their decisions on the failure of Plaintiff-Appellant-Petitioner to present a demand to the state department for a tort claim. A proceeding for tort lies only where an action results in damage. The relationship of Plaintiff-Appellant-Petitioner to the United States government rests on a contractual basis and his demand for indemnification is based on the precept of "assumpsit", and is the result of non-

performance of a duty.

The High Court's attention is also called to the fact that Plaintiff-Appellant-Petitioner advised the state department in his letter of August 28, 1978 that he would take appropriate steps for reimbursement for his loss if the said department did not comply with his demand.

Both courts in their decisions gave no reason for not complying with Petitioner's demand for a jury trial.

CONCLUSION

The sevent amendment of the United Constitution demands and requires that the right to a jury trial cannot be disregarded. Therefore Petitioner requests that the verdict of the court of appeals for the Ninth District be reversed and the case be remanded to the United States district court of California for the Eastern district for a jury trial.

Respectfully submitted,

Otto Burgdorf

Otto Burgdorf
In Propria Persona

APPENDIX

Exhibit A

In The United States District Court For The Eastern District of California

October Term 1981

CIV S-79-185

Otto Burgdorff

Plaintiff

versus

United States of America
Honorable Cyrus R. Vance, Secretary of State
Lillian P. Mullin and Lois M. Day
Employees of Department of State

Defendants

Complaint For Indemnification and Demand For Jury Trial

The Plaintiff, OTTO BURGDORF, for cause of action alleges as follows:

The Plaintiff is a native of Germany and now a citizen and taxpayer of the United States and resides in California since 1923 and has been engaged in farming in Yolo County since 1938.

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Since 1964 Plaintiff is involved in legal actions in Germany with respect to an inheritance claim. This claim is based on the specific provision in the German inheritance law which demands that the minimum part of the estate due each child, the so-called Pflichtteil (obligatory part) is one half of the quotient which results by dividing the value of the estate by the number of heirs. Plaintiff so far has received 6000 marks in 1937 and about 1400 marks after 1964, which is an insignificant sum compared to the amount legally due him.

Exhibit B

In The United States District Court For The Eastern District of California

October Term 1981

CIV S-79-185

Otto Burgdorf,

Plaintiff,

versus

United States, et al.,

Defendants.

Order Granting Motion and Dismissing Complaint

This matter came on for hearing on July 30, 1979, on defendants' Motion to Dismiss, or alternatively, for Summary Judgment. Plaintiff appeared in propria persona; Solomon E. Robinson appeared on behalf of defendant United States. This Court, after considering the Motion and its supporting brief, the entire court file, and after hearing oral argument, agrees with defendants herein that plaintiff's action appears based most clearly on the Federal Torts Claim Act, particularly 28 U.S.C. § 1346(b). As such the action must be dismissed for lack of jurisdiction because plaintiff has not presented a tort claim to the appropriate Federal agency, the U.S. Department of State, which is a condition precedent required by 28 U.S.C. § 2675(a). Caton v. United States, 495 F.2d 635 (9th Cir. 1974).

IT IS FURTHER ORDERED that judgment be entered against Plaintiff and in favor of Defendant, with each side to bear it own costs.

Dated: March 1, 1979

Exhibit C

United States Court of Appeals
For The Ninth Circuit

October Term 1981

No. 79-4494

D.C. No. S 79-185

Otto Burgdorf,
Appellant

versus

United States of America,
Honorable Cyrus A. Vance, et al,
Appellees.

Appeal from the United States District Court
for the Eastern District of California
Philip C. Wilkins, District Judge, Presiding
Submitted December 8, 1980

Before: Goodwin, Sneed and Reinhardt, Circuit Judges

Otto Burgdorf appeals from the order dismissing his action against the government because the Secretary of State failed to press the German government for indemnification of a loss of inheritance sustained in German courts. We affirm.

The filing of a claim with the appropriate federal agency is a jurisdictional prerequisite to maintaining a federal tort claim action in district court. House v. Mine Safety Appliances Co., 573 F.2nd 609, 613-14 (9th Circ.), cert. denied, 439 U.S. 862 (1978). Because Burgdorf failed to allege that he had filed such a claim, and the government filed an affidavit stating that no such claim had been filed, the district judge properly found that jurisdiction was lacking.